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SJC-13096

JOAQUIN DAVID vs. COMMONWEALTH.

January 26, 2022.

Supreme Judicial Court, Superintendence of inferior courts.
Pretrial Detention. District Court, Probable cause
hearing.

The petitioner, Joaquin David, appeals from a judgment of a single justice of this court denying his petition pursuant to G. L. c. 211, § 3. We affirm.

Background. David has been charged in a complaint (first case) with assault and battery causing serious bodily injury, in violation of G. L. c. 265, § 13A (b), and strangulation, in violation of G. L. c. 265, § 15D (b); and, in a separate complaint (second case), with malicious destruction of property, in violation of G. L. c. 266, § 127, and malicious damage to a motor vehicle, in violation of G. L. c. 266, § 28 (a). He was arraigned on July 23, 2020, on both complaints, and after a hearing, a judge in the Boston Municipal Court (BMC) ordered that he be held on a finding of dangerousness pursuant to G. L. c. 276, § 58A. David thereafter filed a petition for review of that determination in the Superior Court, which was denied.

Then, in December 2020, the Commonwealth, anticipating that David would seek release from pretrial detention on the basis that he had been detained for 120 days, requested that David's detention remain in effect.¹ The Commonwealth argued that

¹ General Laws c. 276, § 58A (3), provides that "[a] person detained under this subsection shall be brought to a trial as soon as reasonably possible, but in absence of good cause, the person so held shall not be detained for a period exceeding 120

pursuant to Commonwealth v. Lougee, 485 Mass. 70, 72 (2020), the entire period of David's detention up to that point was excludable, in large part due to the COVID-19 pandemic. After a hearing, in January 2021, a judge in the BMC maintained David's detention and orally indicated that he was doing so on the basis of Lougee.

Separately, David had moved, in the BMC, for a probable cause hearing. At a hearing on October 22, 2020, a judge considered David's motion, discussed in detail with the parties whether David was entitled to a probable cause hearing, and indicated that he was taking the motion under advisement. At a subsequent hearing on November 23, 2020, the judge denied the motion.

The continued detention and lack of a probable cause hearing led to David's G. L. c. 211, § 3, petition, in which he sought review of the extension of his pretrial detention and the denial of his motion for a probable cause hearing. David argued in his petition, among other things, that the court should revisit its decision in Lougee and the issue of pretrial detention pursuant to § 58A in the context of the COVID-19 pandemic. A single justice denied the petition without a hearing.²

days by the district court . . . excluding any period of delay as defined in [Mass. R. Crim. P. 36 (b) (2)]."

² After David's appeal was entered in this court, we decided Mushwaalakbar v. Commonwealth, 487 Mass. 627 (2021), in which we did just what David asked for in his G. L. c. 211, § 3, petition -- that is, we revisited our holding in Lougee in light of the passage of time since Lougee was decided. Although jury trials had resumed during that period, we recognized "the possibility of continued unforeseen delays, as well as the fact that in some cases the length of pretrial detention may have approached or exceeded the limits of constitutional due process." Id. at 628. On the basis of those concerns, we concluded that "certain defendants are entitled to hearings on motions for reconsideration of § 58A orders to determine whether the length of detention violates due process." Id. at 632-633. With the benefit of our decision in Mushwaalakbar, David filed a motion in the Superior Court to reconsider the order of pretrial detention. A judge denied the motion after a hearing. David did not petition the county court for review of that ruling.

Discussion. 1. Pretrial detention. In his appeal from the denial of his G. L. c. 211, § 3, petition, David now argues that the initial finding of dangerousness was erroneous; that his motions to reconsider the initial detention order, on the basis of changed circumstances, were erroneously denied; and that the Commonwealth's request to extend his detention should not have been allowed. The only relief that he actually sought in his petition before the single justice, however, as to pretrial detention, was reversal of the BMC's January 2021 order allowing the Commonwealth's request to extend his detention. On that limited issue, and applying the law that was in effect at the time, including our holding in Lougee, the single justice did not err or abuse his discretion in denying the requested relief. To the extent that David now argues on appeal that the initial finding of dangerousness was erroneous, he did not raise that issue before the single justice, and we therefore need not consider it.³ See Carvalho v. Commonwealth, 460 Mass. 1014, 1014 (2011), and cases cited.

Furthermore, although we decided Mushwaalakbar v. Commonwealth, 487 Mass. 627 (2021), after the single justice's denial of David's petition, see note 2, supra, David has already received the relief that he is entitled to pursuant to that decision, i.e., a hearing in the trial court on his motion to reconsider the pretrial detention order on the ground that the length of his detention violates due process.^{4,5}

³ David specifically stated in a footnote in his petition that he was "not directly seeking review of the underlying dangerousness finding," although, in a conclusory fashion, he "maintain[ed] the position that the order [was] not legally supported by clear and convincing evidence." He also noted in a conclusory fashion that the single justice had authority to review the pretrial detention order de novo, but he did not make any specific argument toward that end.

⁴ The limited matter before us in this appeal is the single justice's denial of David's G. L. c. 211, § 3, petition. Because the petition and the single justice's ruling predated the decision in Mushwaalakbar, they did not concern Mushwaalakbar or the Superior Court's subsequent ruling in light of Mushwaalakbar. Nor did David seek review of the Superior Court's ruling in the county court. That ruling is therefore not before us in this appeal, and we do not consider David's argument concerning it.

⁵ In any event, according to David, the trial court "has now

2. Probable cause hearing. As with the issue of pretrial detention, on the record that was before him and in the circumstances of the case at the time, the single justice did not err or abuse his discretion in denying relief on the issue of the lack of a probable cause hearing. We recognize, however, that an additional ten months have passed since then, and that David has still not had a probable cause hearing; nor has he been indicted. And although it does appear that the cases are proceeding toward trial in the BMC, no trial date has yet been set.

The parties agree that the charges against David fall within the concurrent jurisdiction of the BMC and the Superior Court. They disagree as to whether David is entitled to a probable cause hearing. Pursuant to Mass. R. Crim. P. 3 (f), as appearing in 442 Mass. 1502 (2004), "defendants charged in a District Court with an offense within the concurrent jurisdiction of the District and Superior Courts for which the District Court will not retain jurisdiction, have the right to a probable cause hearing, unless an indictment has been returned for the same offense."⁶ In the Commonwealth's view, it follows that if the District Court is going to retain jurisdiction, no probable cause hearing (the point of which is to determine whether to bind a defendant over to the Superior Court for trial) is required.

Here, the Commonwealth states that the BMC "has never suggested that it will not retain jurisdiction" over David's case. See Commonwealth v. Clemmons, 370 Mass. 288, 291 & n.2 (1976) (where there was no indication that District Court judge was considering declining jurisdiction, inference existed that judge intended to exercise jurisdiction and that proceeding that had taken place in that court was trial on merits, not probable cause hearing); Corey v. Commonwealth, 364 Mass. 137, 141 n.7

acknowledged" that he is entitled to conditions of release, and he has stated that he is preparing a proposal, in the trial court, for release with conditions. If David is dissatisfied with the conditions ultimately imposed, he can seek review from that ruling.

⁶ Although it appears that the Commonwealth may have, at least initially, intended to seek indictments against David, it has not yet presented David's case to a grand jury; nor is there any indication that it currently intends to do so.

(1973) ("[A] District Court judge should announce, before the hearing commences, whether he is conducting a probable cause hearing or a full trial on the merits"). The inference then, is that the BMC will retain jurisdiction, that David will be tried in that court, and that, therefore, no probable cause hearing is necessary.

It does appear that the BMC intends to retain jurisdiction and that the cases are moving toward trial in that court. The BMC dockets indicate that a hearing on "discovery compliance and jury election" took place as recently as December 22, 2021.⁷ If a trial is to occur in the BMC, any remaining claims that David might have regarding his due process rights, regarding the delay in the proceedings, or otherwise can be raised in an appeal in the event he is convicted and can adequately be addressed at that time. If, however, the BMC does not intend to retain jurisdiction, then David is entitled to a prompt probable cause hearing.

Conclusion. On the basis of the record that was before him, and in the context of the law in effect at the time, the single justice did not err or abuse his discretion in denying relief, and his judgment is affirmed. If the BMC does not intend to retain jurisdiction of the case, the BMC must set a date for a probable cause hearing to take place within the next thirty days.

So ordered.

The case was submitted on the papers filed, accompanied by a memorandum of law.

Tracy N. Firicano for the petitioner.

Andrew S. Doherty, Assistant District Attorney, for the Commonwealth.

⁷ Additionally, as far back as October 22, 2020, the Commonwealth stated, at the hearing at which a BMC judge considered David's motion for a probable cause hearing, that if David wanted a trial on the merits, the case should be "put . . . on track for a trial on the merits" in the BMC.